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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, _____

No. 607

RAY JACKSON CRIBB,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit.

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## PETITION FOR A WRIT OF CERTIORARI
### To The United States Court of Appeals For The Fifth Circuit.

Petitioner, Ray Jackson Cribb, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on the 21st day of June, 1969.

## OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 74) is reported at F.2d and is reproduced in the Appendix to this petition.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was dated and entered on the 21st day of June,

1968 (R. 80). Petitioner filed a petition for rehearing on the 9th day of July, 1968, (R. 81), which was denied by the Court of Appeals in a per curiam opinion dated the 5th day of September, 1968 (R. 88). Said judgment and Order Denying Rehearing is reproduced in the Appendix of this petition. The jurisdiction of ths Court is invoked under 28 U.S.C., 1254 (1).

## QUESTIONS PRESENTED

1. Is the evidence sufficient to support a conviction on *any one* or all of the charges of (1) possession of an unregistered still, (2) carrying on the business of a distiller without giving bond, (3) carrying on the business of a distiller with intent to defraud the United States, (4) working at a distillery not bearing a sign, (5) possession of moonshine whiskey shown by the evidence to have been located at the still and (6) possession of certain distilling apparatus and raw materials enumerated in the indictment and most of which was shown by the evidence to be located at the still site, when:

(a) the defendant was arrested on a still road approximately 280 yards from a distillery in his automobile which was loaded with sugar and a case of yeast,

(b) the defendant made no attempt to flee,

(c) the automobile smelled of moonshine whiskey and was equipped with a set of overload springs,

(d) after being arrested and taken to the still site, defendant said to the officers with reference to a man who had driven up to the still in a pickup truck approximately 40 minutes prior to the defendant's arrest, that they "could turn that boy loose, he wasn't going to run" and later said to the officers, with reference to making bond "Let me

make bond now. I know you are going to tear these up and I've got to get some more started.",

(e) there was no other evidence connecting defendant with the still,

(f) counsel for defendant made a timely motion for Judgment of Aquittal on each and every count.

2. Did the trial court commit reversible error in failing to charge the jury on the law concerning circumstantial evidence where defendant was charged with violations concerning the still and there was only circumstantial evidence connecting defendant with the still (as set forth in Question 1 hereinabove), although defendant did not request such a charge.

3. Did the trial court err in its charge to the jury in a criminal case where the United States of America was plaintiff in stating, "You are citizens of the United States. The United States is a corporation sovereign. You may be likened to stockholders in that corporation."

4. Did the trial court err in its charge to the jury that when a defendant is charged in one count of an indictment with the possession of eight 1,800-gallon tank type stills, 12,960 gallons of mash, 500 pounds of wheat bran, 200 feet of plastic hose, 2 still caps, 1 shotgun type condenser, 2 burners, 1 Briggs and Stratton 3-horsepower gas engine with water pump attached, 18 hundred pound butane gas bottles "And then it says 24 pounds of Fleischman's yeast and 1740 pounds of Dixie Crystal sugar," with the intent to use the same in the non-taxpaid distilled spirits business, then it would be your duty to convict him on that count if he possessed only the yeast or the sugar, when the evidence clearly showed that the jury could find under the

evidence that the defendant had no connection with any of the items except the yeast and the sugar.

5. Did the Court of Appeals err in failing to pass on Appellant's attack on his conviction on three counts (two of which were felony counts) solely on the basis that the sentences received on these counts ran concurrently with the sentences imposed on other counts (two of which were felony counts) upon which the Court of Appeals found that there was no question of guilt.

## CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States, Sections 5173 (a), 5179 (a), 5180, 5205 (a) (2), 5601 (a) (1), 5602, 5604 (a) (1), 5681 (c) and 5686 (a), Internal Revenue Code of 1954, Section 3231, Title 18, United States Code and Rule 18, Federal Rules of Criminal Porcedure are involved which are set forth in the Appendix.

## STATEMENT OF THE CASE

Petitioner was indicted in the District Court of the United States for the Middle District of Georgia in a six count indictment charging violations of the Internal Revenue laws relating to liquors, as follows:

Count One—Possessing and having under his custody and control a distilling operation.

Count Two—Carrying on the business of a distiller without giving bond.

Count Three—Carrying on the business of a distiller with intent to defraud the United States of taxes.

Count Four—Working in a distillery not bearing a sign.

Count Five—Possessing distilled spirits, to-wit: whiskey, the immediate container of which dd not have affixed tax stamps.

Count Six—Possessing distilling apparatus and raw materials intending to use the same in the non-taxpaid distilled spirits business (this count itemized certain distilling apparatus and raw materials some of which items the evidence showed to be located at the still exclusively as well as the sugar and yeast which the evidence shows to have been located exclusively in defendant's automobile).

Petitioner was brought to trial upon the charges in this indictment in said District and the facts material to the consideration of the questions presented is as follows:

On January 30, 1967 at approximately 6:10 p.m. Alcohol and Tobacco Tax Special Investigators working with Georgia and Florida State Agents seized an illegal moonshine whiskey distillery in Clinch County, Georgia.

The distillery was situated in a wooded area a considerable distance from Georgia Highway 177. A dirt road led from the highway to a house. From the house, a narrow woods road ran for approximately 480 yards, terminating at the distillery.

Approximately 200 yards from the house, the woods road intersected with an unused road which led to Highway 441.

At the time of the raid on the distillery, the still was in operation.

The officers seized eight 1,800-gallon steel tank stills, fermenting mash, miscellaneous distilling equipment, and 240 gallons of non-taxpaid whiskey contained in five-gal-

lon plastic jugs to which no Internal Revenue stamps were affixed. The distillery had no sign posted.

While the officers were at the distillery, and at approximately 7:50 p.m. a man named Parrish appeared driving a pickup truck and was arrested.

At about 8:30 p.m., Kelley, an investigator for the Alcohol and Tobacco Tax Division of the Treasury Department left the distillery on the woods road, driving toward Highway 177. At a point approximately 280 yards from the distillery he saw a car approaching on the woods road with its lights on. The car stopped, backed up approximately 20 yards onto the unused road, and stopped. The investigator continued up to the car. The Appellant got out, shook hands with the officer, identified himself by name, gave no trouble to officer Kelley and did not attempt to flee.

Officer Kelley had seen through the glass of the automobile and saw several sacks marked "Dixie Crystal Sugar" in the rear. Investigator Kelley then identified himself and placed the Appellant under arrest. The Appellant was advised of his constitutional rights against self-incrimination and his right to counsel.

Officer Kelley then turned custody of the Appellant over to fellow officers who were called and who took the Appellant to the distillery.

The automobile dirven by Appellant was a white, 1962, Chrysler, 4-door sedan. Its rear seat had been removed. There were found in the car twenty-nine 60-pound bales of Dixie Crystal Sugar and a case containing twelve 2-pound cans of yeast. There was also a strong odor of moonshine whiskey inside the car and the automobile was equipped with a set of overload springs.

Upon arriving at the distillery the Appellant saw the co-defendant Parrish handcuffed and sitting by a tree. The Appellant told the officers that they "could turn that boy loose, he wasn't going to run." He later asked how much his bail was and told the officers, "Let me make bond now. I know you are going to tear these up and I've got to get some more started."

At the close of the government's case, the defense presented no evidence but made a motion for judgment of acquittal as to each of Counts One through Five on the basis of the insufficiency of the evidence to support a verdict of guilty on any one or all of those counts and further made a motion for judgment of acquittal as to Count Six in that the items itemized in that count included not only the sugar and yeast found in the automobile but also the distilling apparatus found at the still and therefore, if the evidence was insufficient as to Counts One through Five, then the jury would not be entitled to return a verdict as to Count Six.

The court overruled the motions and then proceeded to charge the jury.

The Court charged the jury, ". . . The United States is a corporation sovereign. You may be likened to stockholders in that corporation . . . ."

The Trial Court later charged with reference to Count Six that if the jury found the defendant guilty of possessing the sugar or the yeast with the requisite intent, then it would be their duty to convict him on that Count.

Counsel for petitioner objected to the charge on Count Six in that, since there were two distinct categories of items which defendant was charged with possessing, it would be improper to convict him on this count upon a finding that

he possessed a substantial part of only one category, the items in the car, particularly under the facts of this case.

The jury returned a verdict of guilty on all counts and Appellant was sentenced to serve two years on Counts One, Two, Three and Five and twelve months on Counts Four and Six, all to run concurrently.

## ARGUMENT

### GENERAL

The decision below of the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this court, has decided a federal question in a way in conflict with applicable decisions of this court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

### QUESTION ONE

The evidence, when considered in the most favorable light for the prosecution, shows a circumstantial case against the petitioner as to Counts One through Five. The evidence which could conceivably support a conviction on Counts One through Five and a conviction for possession of a majority of the items listed in Count Six was circumstantial and consisted entirely of the statements made by the petitioner after being arrested and taken to the still.

Now, we will consider the value and weight of evidence of those statements of petitioner after being taken to the still under arrest and while still under arrest.

First, he is said to have commented, when he saw defendant Parrish handcuffed at the still, that the boy could

be turned loose that he was not going to run. This indeed was no value at all as evidence except to indicate that petitioner had an opinion as to whether or not Parrish would try to run if unhandcuffed. It could possibly further be inferred that petitioner knew Parrish even though he did not say so but, even so, this would not be incriminating to petitioner. It will be recalled that there was no evidence that Parrish ever worked at or had any connection with the still. The only evidence as to Parirsh was that Parrish drove up to the still in a truck almost two hours after the raid and was apprehended. Even if petitioner did know him, he only knew a person who drove up. He could well have come to buy whiskey. It would be entirely speculative and far from being free of reasonable doubt, to conclude or infer anything further from this comment, that is to say, either as to what he meant or whether he had been there before or had any connection with the still.

Second, he is said to have inquired about his bond, asked to make bond now and then stated that he knew they were going to tear "these up" and "I've got to go get some more started." What was he referring to? Perhaps he was referring to the still. On the other hand, even so, did the statement mean that he had started the still that was there? We say absolutely not. We say this would not necessarily follow at all. To the contrary, it would be highly speculative and reasonably doubtful for this to be concluded. His statement made no reference to owning, operating or even to "getting started" the ones at hand but quite to the contrary referred to some "more" or other ones.

All in all, what is to be understood from these remarks of petitioner? We know it is entirely within the province of the jury to weigh evidence properly before it. However, we contend that this evidence was not sufficient as a mat-

ter of law, when added to the other evidence to tip the scales and permit the trial court to overrule the Motion for Judgment of Acquittal on Counts One through Five.

In regard to the yardstick to be used in a circumstantial case by the court in deciding a question of law as opposed to the jury in deciding a question of fact, we cite CUTHBERT v. U.S. (Fifth Circuit, 1960) 278 F.2d 220 in which it is concluded on page 224:

> ". . . . we are of the clear opinion that in a case where the evidence relied on to establish guilt is entirely circumstantial, it is essential to a just decision by the district judge that the evidence makes out a fact case for the decision of the jury, that the court conclude that the jury might reasonably find not only that the evidence is consistent with a finding of guilt but that it is not consistent with any other reasonable conclusion. If this is not so, a verdict of guilty beyond a reasonable doubt, based wholly on circumstantial evidence, though it keeps the promise of a fair trial to the ear, breaks it to the hope."

We would like to bring to the court's attention "rational connection" which so much has been written about (See United States v. Gainey, 380 U.S. 63, 13 L. ed. 2d 658, 85 S. Ct. 754), in connection with statutory presumptions. This reasoning is just as reasonable with inferences as under consideration in the present circumstantial case. Much has been said about the fact that the inference must not be "strained". We urge that without question an inference of facts to support a conviction of this appellant on any one of Counts One through Five would be speculative, not without reasonable doubt and "strained" and that convictions on these counts should not be allowed to stand.

U.S. v. Gainey, supra, deals with a situation where defendants drove up to a still under far greater incriminating circumstances than in the present case. It was 4:40 A.M., they had butane gas in a truck (indicating still participation), they reached the still site, they tried to escape and there were admissions of ownership of the still. Counts One and Two were similar to the ones in the instant case. There is however a vast difference in the instant facts as to Counts One and Two. Most important, is the fact that the court held there that there was no evidence whatever of intent to defraud and that the conviction as to Count Three could not stand. Similarly, in the instant case the evidence as to intent to defraud is equally as lacking. Therefore, unless his statement to the effect that "I've got to get some more started," connected with the fact that he was headed toward a still in a car having a moonshine odor and carrying sugar and yeast can, without a reasonable doubt and excluding every reasonable hypothesis of innocence, show him to have (1) possessed the still (2) engaged in the business of distiller without bond (3) engaged in the business of distiller with intent to defraud (4) worked at a still with no sign and/or (5) possessed the moonshine whiskey at the still, then this court should grant this petition.

The indictment in which he was charged with all respects of ownership and operation of the still was submitted to the jury. Even working at a still without a sign was submitted to the jury. There is no evidence that he had ever been to the still site. How would he know whether or not there was a sign. We think the sign requirement has some importance to the worker. If he has never been there how would he know whether or not there is a sign?

In conclusion, one might reasonably conclude that ap-

pellant was intending to deliver his sugar and yeast in the vicinity of a still which had been raided. However, any other connecton with the still would be mere surmise. Appellant was transporting sugar and yeast, was headed toward and in the vicinity of a distillery, knew another person who visited the distillery and said with reference to "something" that was to be destroyed that he had to get "some more started." However, his comments only cast suspicion and conjecture as to the charges in Counts One through Five. Also, the same is true as to Count Six as it is drawn, otherwise he has been convicted on suspicion of possession of the still and mash and whiskey located at the still and the court has departed from the accepted and usual course of judicial proceeding and violated the due process guarantees of the constitution.

## QUESTION TWO

The trial court must accept a substantial responsibility in charging the jury properly as to the law by which it is bound in deciding the facts in a case. Without question the law concerning circumstantial evidence was involved and was so basically essential to the jury in its determination that it was reversible error for the court to fail the charge concerning the same regardless of any request by the defendant.

## QUESTION THREE

The trial court in its charge to the jury in charging each of the jurors as to his strict responsibility as a citizen and likening each of them to stockholders in a corporation which corporation was a party to the action on trial violated the guarantees of due process under the Fourteenth Amendment of the Constitution of the United States.

## QUESTION FOUR

The jury is charged, as to Count Six, that it was not necessary to find that petitioner possessed all of the property listed in that count but that he possessed only the sugar or only the yeast which were located in the car and the remaining items listed were located at the still. We submit this to be erroneous in that the count charged possession of two different categories of items, those in the car and those at the still. If the law was otherwise the government could have charged petitioner with possessing any number of other stills and quantities of raw materials in this count and the charge still be the same and authorized. A line must be drawn somewhere and we think it was exceeded here.

## QUESTION FIVE

No Federal Court of the United States is allowed under the Fourteenth Amendment of the Constitution of the United States, guaranteeing due process of law, to allow any conviction to stand without regard to whether or not the defendant has been lawfully convicted of the same. Petitioner was entitled to a decision from the Court of Appeals for the Fifth Circuit as to whether or not he was lawfully convicted of Counts One, Five and Six, the lawfulness of which was properly presented to that court. However the Court of Appeals for the Fifth Circuit in its opinion concluded and found that it need not pass upon the same because of concurrent sentences on other counts.

## CONCLUSION

The questions presented by this case are of great and recurring significance in the administration of the criminal law. The serious questions of public policy and individual

rights involved here and the effect of the decision below, if not reviewed and reversed, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

For these reasons and the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.